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3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 JENNY L. GLASCO,

Case No. 2:14-cv-00651-RFB-PAL

8 Plaintiff,

9 v.

**REPORT OF FINDING AND
RECOMMENDATION**

10 CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

(Mot. To Remand – ECF No. 14)
(Cross-Mot. to Affirm – ECF No. 16)

11
12 Defendant.

13 This matter involves Plaintiff Jenny L. Glasco's appeal and request for judicial review of
14 the Commissioner of Social Security, Defendant Carolyn W. Colvin's final decision denying her
15 claim for disability insurance benefits (DIB) under Title II of the Social Security Act (the "Act"),
16 42 U.S.C. §§ 401–33 and claim for supplemental security income (SSI) under Title XVI of the
17 Act, 42 U.S.C. §§ 1381–83.

18 **BACKGROUND**

19 **I. PROCEDURAL HISTORY**

20 Glasco protectively filed a Title II application for disability and disability insurance
21 benefits on May 16, 2011, alleging a disability date of onset of June 1, 2004. AR 99-105. At the
22 time of her application, she was 36 years old. AR 104-105. Her disability claim was denied
23 initially on July 14, 2011, AR 56-59, and upon reconsideration on November 22, 2011. AR 63.
24 She requested a hearing and a hearing was conducted before Administrative Law Judge ("ALJ")
25 Norman Bennett on October 4, 2012. AR 29-51. At the time of the hearing, Glasco had returned
26 to work. AR 31-32. Counsel therefore asked the ALJ to consider a closed period of disability
27 benefits for the period between December 1, 2007 and April 1, 2012. *Id.* The ALJ issued an
28 unfavorable determination denying disability benefits on October 19, 2012. AR 13-28. Glasco

1 requested review with the Appeals Council on December 6, 2012. AR 11-12. The Appeals
2 Council denied the request for review on January 16, 2014. AR 5-10.

3 Glasco filed her Complaint (ECF No. 1) April 29, 2014, seeking judicial review of the
4 Commissioner's decision pursuant to 42 U.S.C. § 405(g). The Commissioner filed her Answer
5 (ECF No. 8) August 25, 2014. Glasco filed her Motion for Remand and Supporting Memorandum
6 of Points and Authorities (ECF No. 14) November 5, 2014. The Commissioner filed its Opposition
7 and Memorandum in Support of Cross-Motion for Summary Judgment (ECF Nos. 16, 17) on
8 December 2, 2014. No reply was filed. The court has considered the motion, the Commissioner's
9 Opposition and Cross-Motion for Summary Judgment, and the Administrative Record in this case.

10 **DISCUSSION**

11 **I. APPLICABLE LAW**

12 **A. Judicial Review of Disability Determination**

13 District courts review administrative decisions in social security benefits cases under 42
14 U.S.C. § 405(g). *Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). The statute provides
15 that after the Commissioner has held a hearing and rendered a final decision, a disability claimant
16 may seek review of that decision by filing a civil lawsuit in a federal district court in the judicial
17 district where the disability claimant lives. 42 U.S.C. § 405(g). The statute also provides that the
18 district court may enter, "upon the pleadings and transcripts of the record, a judgment affirming,
19 modifying, or reversing the decision of the Commissioner of Social Security, with or without
20 remanding the cause for a rehearing." *Id.*

21 The Commissioner's findings of fact are conclusive if supported by substantial evidence.
22 42 U.S.C. § 405(g); *Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005). But the Commissioner's
23 findings may be set aside if they are based on legal error or not supported by substantial evidence.
24 *Stout v. Comm'r Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006); *Thomas v. Barnhart*, 278
25 F.3d 947, 954 (9th Cir. 2002). The Ninth Circuit defines substantial evidence as "more than a
26 mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind
27 might accept as adequate to support a conclusion." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
28 Cir. 1995); *see also Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005). In determining

1 whether the Commissioner's findings are supported by substantial evidence, a court "must
2 consider the entire record as a whole and may not affirm simply by isolating a 'specific quantum
3 of supporting evidence'." *Ghanim v. Colvin*, 763 F.3d 1154, 1160 (9th Cir. 2014) (quoting *Hill v.*
4 *Astrue*, 698 F.3d 1153, 1159 (9th Cir. 2012)).

5 Under the substantial evidence test, a court must uphold the Commissioner's findings if
6 they are supported by inferences reasonably drawn from the record. *Batson v. Comm'r Soc. Sec.*
7 *Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2003). When the evidence will support more than one
8 rational interpretation, a court must defer to the Commissioner's interpretation. *Burch v. Barnhart*,
9 400 F.3d 676, 679 (9th Cir. 2005). Consequently, the issue before a court is not whether the
10 Commissioner could reasonably have reached a different conclusion, but whether the final decision
11 is supported by substantial evidence.

12 It is incumbent upon an ALJ to make specific findings so that a court does not speculate as
13 to the basis of the findings when determining if the Commissioner's decision is supported by
14 substantial evidence. See *Burrell v. Colvin*, 775 F.3d 1133, 1140 (9th Cir. 2014). Mere cursory
15 findings of fact without explicit statements about what portions of the evidence were accepted or
16 rejected are not sufficient. *Lewin v. Schweiker*, 654 F.2d 631, 634 (9th Cir. 1981). An ALJ's
17 findings should be comprehensive, analytical, and include a statement explaining the "factual
18 foundations on which the ultimate factual conclusions are based." *Id.* See also *Vincent v. Heckler*,
19 739 F.2d 1393, 1394–95 (9th Cir. 1984) (an ALJ need not discuss all the evidence in the record,
20 but must explain why significant probative evidence has been rejected).

21 **B. Disability Evaluation Process**

22 A claimant has the initial burden of proving disability. *Roberts v. Shalala*, 66 F.3d 179,
23 182 (9th Cir. 1995). To meet this burden, a claimant must demonstrate an "inability to engage in
24 any substantial gainful activity by reason of any medically determinable physical or mental
25 impairment which can be expected . . . to last for a continuous period of not less than 12 months."
26 42 U.S.C. § 423(d)(1)(A). A claimant must provide specific medical evidence to support his or
27 her claim of disability. *Reddick v. Chater*, 157 F.3d 715, 721 (9th Cir. 1998). If a claimant
28 establishes an inability to perform his or her prior work, the burden shifts to the Commissioner to

1 show that the claimant can perform other substantial gainful work that exists in the national
2 economy. *See Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012) (noting that a claimant bears
3 the burden of proof until the final step in the evaluation process).

4 **II. THE ALJ'S DECISION**

5 An ALJ follows a five-step sequential evaluation process in determining whether a
6 claimant is disabled. 20 C.F.R. § 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987). If at any
7 step an ALJ makes a finding of disability or non-disability, no further evaluation is required. 20
8 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003).

9 Here, the ALJ followed the five-step sequential evaluation process and issued an
10 unfavorable decision on October 19, 2012 (the "Decision") finding that Glasco was not disabled.
11 AR 16-24. He found that she suffered from the severe impairments of: degenerative disc disease
12 of the cervical spine, and degenerative disc disease of the lumbar spine status post remote
13 surgeries. However, he concluded Glasco had the residual functional capacity to perform a full
14 range of sedentary work, and that during the closed period of disability, she was capable of
15 performing her past relevant work as a secretary, which DOT classifies as SVP 6, sedentary. He
16 therefore denied her application for disability and disability insurance benefits for the closed period
17 of disability alleged between December 1, 2007, and April 1, 2012.

18 **A. Step One**

19 The first step of the disability evaluation requires an ALJ to determine whether the claimant
20 is currently engaging in substantial gainful activity ("SGA"). 20 C.F.R. §§ 404.1520(b),
21 416.920(b). SGA is defined as work activity that is both substantial and gainful; it involves doing
22 significant physical or mental activities, usually for pay or profit. 20 C.F.R. §§ 404.1572(a)–(b),
23 416.972(a)–(b). If the claimant is currently engaging in SGA, then a finding of not disabled is
24 made. If the claimant is not engaging in SGA, then the analysis proceeds to the second step. The
25 ALJ found the claimant did not engage in substantial gainful activity during the requested closed
26 period of disability of December 1, 2007, through April 1, 2012. AR 18.

27 **B. Step Two**

28 The second step of the disability evaluation addresses whether a claimant has a medically

determinable impairment that is severe or a combination of impairments that significantly limits him or her from performing basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). An impairment or combination of impairments is not severe when medical and other evidence establish only a slight abnormality or a combination of slight abnormalities that would have no more than a minimal effect on the claimant's ability to work. 20 C.F.R. §§ 404.1521, 416.921; Social Security Rulings ("SSRs") 85-28, 96-3p, 96-4p.¹ If a claimant does not have a severe medically determinable impairment or combination of impairments, then an ALJ will make a finding that a claimant is not disabled. If a claimant has a severe medically determinable impairment or combination of impairments, then an ALJ's analysis proceeds to the third step.

1. Glasco's Severe Impairments

The ALJ found that through the date last insured, Glasco's severe impairments consisted of degenerative disc disease of the cervical spine and degenerative disc disease of the lumbar spine status post remote surgeries. He also found that these impairments, in combination, caused more than minimal limitation to Glasco's ability to engage in work-related activities, and were therefore severe. AR 18.

2. Glasco's Non-Severe Impairments

The ALJ found that Glasco suffered from the non-severe impairment of bilateral shoulder osteoarthritis which caused no more than minimal limitation in her ability to engage in work-related activities. *Id.* Glasco underwent a diagnostic and surgical arthroscopy of the right shoulder with arthroscopic subacromial decompression on January 16, 2006, and had a diagnostic and surgical arthroscopy of the right shoulder with capsular labral reconstruction secondary to impingement of the right shoulder on October 15, 2007. *Id.* She recovered from her surgery after four months, which fell short of the durational requirement required for disability benefits which requires a claimant to prove she was unable to engage in substantial gainful activity due to a disability for twelve continuous months. *Id.* He therefore found that her shoulder impairment was

¹ SSRs are the SSA's official interpretations of the Act and its regulations. *See Bray v. Comm'r Soc. Sec. Admin.*, 554 F.3d 1219, 1224 (9th Cir. 2009); *see also* 20 C.F.R. § 402.35(b)(1). They are entitled to some deference as long as they are consistent with the Act and regulations. *See Bray*, 554 F. 3d at 1223 (finding ALJ erred in disregarding SSR 85-41).

1 non-severe because her recovery time was only four months. *Id.*

2 **C. Step Three**

3 Step three of the disability evaluation requires an ALJ to determine whether a claimant's
4 impairments or combination of impairments meet or medically equal the criteria of an impairment
5 listed in 20 C.F.R. Part 404, Subpart P, Appendix 1, which is commonly referred to as the
6 "Listings." 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, and 416.826. If
7 a claimant's impairment or combination of impairments meet or equal the criteria of the Listings
8 and meet the duration requirement (20 C.F.R. §§ 404.1509, 416.909), then an ALJ makes a finding
9 of disability. 20 C.F.R. §§ 404.1520(h), 416.920(h). If a claimant's impairment or combination
10 of impairments does not meet or equal the criteria of the Listings or meet the duration requirement,
11 then the analysis proceeds to the next step. The ALJ found that during the requested closed period
12 of disability, Glasco did not have an impairment or combination of impairments that met or
13 medically equaled the severity of a listed impairment.

14 **D. Step Four – Glasco's RFC**

15 The fourth step of the disability evaluation requires an ALJ to determine whether a claimant
16 has the residual functional capacity ("RFC") to perform her past relevant work ("PRW"). 20
17 C.F.R. §§ 404.1520(f), 416.920(f). To answer this question, an ALJ must first determine a
18 claimant's RFC. 20 C.F.R. §§ 404.1520(e), 416.920(e). RFC is a function-by-function assessment
19 of a claimant's ability to do physical and mental work-related activities on a sustained basis despite
20 limitations from impairments. SSR 96-8p. In making this finding, an ALJ must consider all the
21 relevant evidence such as symptoms and the extent to which they can be reasonably be accepted
22 as consistent with the objective medical evidence and other evidence. 20 C.F.R. §§ 404.1529,
23 416.929; SSRs 96-4p, 96-7p. To the extent that a claimant's statements about the intensity,
24 persistence, or functionally limiting effects of pain or other symptoms are not substantiated by
25 objective medical evidence, an ALJ must make a finding on the credibility of a claimant's
26 statements based on a consideration of the entire case record. An ALJ must also consider opinion
27 evidence in accordance with the requirements of 20 C.F.R. §§ 404.1527 and 416.927 and SSRs
28 96-2p, 96-5p, and 06-3p.

1 At Step Four, the ALJ found that Glasco had the RFC to perform the full range of sedentary
2 work as defined in 20 C.F.R. §§ 404.1567(a). AR 19.

3 **E. Step Four – Glasco’s Ability to Perform her PRW**

4 Once an ALJ has determined a claimant’s RFC as an initial consideration at step four, an
5 ALJ utilizes the RFC assessment to determine whether a claimant can perform her past relevant
6 work (“PRW”). 20 C.F.R. §§ 404.1520(f), 416.920(f). PRW means work performed either as a
7 claimant actually performed it or as it is generally performed in the national economy within the
8 last fifteen years or fifteen years prior to the date that disability must be established. In addition,
9 the work must have lasted long enough for a claimant to learn the job and to perform it as SGA.
10 20 C.F.R. §§ 404.1560(b), 404.1565, 419.960(b), 416.965. If a claimant has the RFC to perform
11 his or her past work, then an ALJ makes a finding that a claimant is not disabled.

12 At step four in the Decision, the ALJ concluded that during the closed period of disability,
13 Glasco was capable of performing her PRW as a legal secretary, which is classified under DOT
14 201.362-030 as SVP 6, sedentary. AR 23. He also found that this work did not require the
15 performance of work-related activities precluded by Glasco’s RFC. *Id.*

16 **F. Step Five**

17 Step five of the disability evaluation requires an ALJ to determine whether a claimant is
18 able to do any other work considering her RFC, age, education, and work experience. 20 C.F.R.
19 §§ 404.1520(g), 416.920(g). If she can do other work, then an ALJ makes a finding that a claimant
20 is not disabled. Although a claimant generally continues to have the burden of proving disability
21 at this step, a limited burden of going forward with the evidence shifts to the Commissioner. The
22 Commissioner is responsible for providing evidence that demonstrates that other work exists in
23 significant numbers in the national economy that the claimant can do. *Yuckert*, 482 U.S. at 141–
24 42; *see also Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012) (citing 42 U.S.C. § 423(d)(2)(A)).

25 Because the ALJ found that Ms. Glasco was able to perform her PRW during the closed
26 period of disability, he determined she was not disabled. As such, there was no need for him to
27 proceed to fifth step analysis.

28 ///

1 **III. THE PARTIES' POSITIONS**

2 **A. Glasco's Motion to Reverse and/or Remand**

3 The sole argument on which Glasco bases her Motion to Remand is the ALJ's failure to
 4 accept or reject her treating physician's findings. Glasco argues that treating physician Govind
 5 Koka, DO, was her treating physician for the relevant period. Dr. Koka completed a medical
 6 assessment of ability to do work related questionnaire on October 4, 2012. AR 343-46. Dr. Koka
 7 opined that Ms. Glasco could occasionally lift ten pounds; frequently lift less than ten pounds;
 8 stand and or walk for a total of less than two hours during an eight-hour work day; sit for less than
 9 6 hours during an eight-hour work day with the ability to periodically alternate between sitting and
 10 standing to relieve pain or discomfort; and had limited ability to push/pull with the upper and lower
 11 extremities. *Id.* Dr. Koka opined these limitations were present between 2005, through 2012. AR
 12 346.

13 The motion argues the ALJ's decision denying benefits did not even mention Dr. Koka's
 14 opinion. As a treating physician, his opinions were entitled to special weight because he was
 15 employed to cure his patient, and therefore has a greater opportunity to know and observe the
 16 patient as an individual. Glasco acknowledges that a treating physician's opinion is not necessarily
 17 conclusive either as to a physical condition, or the ultimate question of disability. The weight
 18 given a treating physician's opinion depends on whether it is supported by sufficient medical data
 19 and consistent with all evidence in the record. However, if a treating physician's opinion is
 20 uncontroverted by another doctor, it may be rejected only for "clear and convincing" reasons. If
 21 the treating physician's opinion is controverted by another doctor, it may be rejected only if the
 22 ALJ makes sufficient findings establishing specific and legitimate reasons based on the evidence
 23 of the record. In this case, the ALJ's decision did not even mention Dr. Koka's opinions, or
 24 indicate whether he accepted or rejected them. Thus, the court should credit the opinions of Dr.
 25 Koka as true, find Ms. Glasco is disabled as a matter of law, and remand for an award of benefits.
 26 In the alternative, the court should remand for further proceedings.

27 **B. The Commissioner's Opposition and Cross-Motion for Summary Judgment**

28 The Commissioner argues the ALJ's decision was supported by substantial evidence and

1 free of legal error. Although Plaintiff argues the ALJ improperly ignored the opinions of her
2 treating physician, Dr. Koka, the motion fails to address the ALJ's reasoning for finding Glasco
3 was not disabled. The Commissioner contends that the ALJ reviewed all of the medical evidence
4 in the record which consisted primarily of surgeries and conservative follow up treatment. The
5 ALJ found that the objective medical evidence showed Glasco recovered from her lumbar surgery
6 after nine months. An EMG study showed that her cervical radiculopathy lasted only four to nine
7 months. He properly concluded that the recovery time on her impairments did not exceed twelve
8 continuous months, and therefore, did not satisfy the one-year durational requirement for
9 establishing disability under the Social Security Act.

10 The Commissioner maintains that the ALJ did not ignore the doctor's opinion. Rather,
11 although he did not specifically identify him by name, reversal is not required. The ALJ is not
12 required to comment on every piece of evidence in the record. What is important is that the ALJ
13 discussed the medical evidence relied on by Dr. Koka to provide his opinion. The Commissioner
14 requests that the court uphold the ALJ's decision as supported by substantial evidence and free of
15 reversible error. However, if the court concludes the opinion is not supported by substantial
16 evidence or free of reversible error, the court should remand for further proceedings. This is not
17 such an unusual case that merits the discretionary decision to remand for an award of benefits.

18 **IV. THE ADMINISTRATIVE RECORD**

19 **A. The Administrative Hearing**

20 Glasco appeared represented by her counsel, Attorney Charles Weiser. Mr. Weiser stated
21 his client was disabled from two accidents, one that occurred in June of 2004, and second, a slip-
22 and-fall in 2009. At the time of the administrative hearing, she had returned to work. AR 31-32.
23 As a result, counsel asked the ALJ to consider a closed period of disability benefits for the period
24 of December 1, 2007, to April 1, 2012. *Id.* Mr. Weiser stated that disability from the date last
25 insured was supported by a history of four surgeries, a cervical fusion in 2006, a lumbar fusion in
26 2009, a right orthoscopic shoulder surgery in 2006, and a right shoulder surgery in 2007. AR 32.

27 Ms. Glasco testified that she was 36 years old at the time of the hearing. She was 5'1" and
28 weighed 125 pounds. AR 33. She had three children under the age of 18—16, 14 and 7. AR 33-

1 34. Her oldest child was 19 and helped around the house. AR 34. She went back to work in April
2 of 2012 doing office work three to four hours a week, one day a week. AR 35. Her prior
3 employment history consisted of positions as a secretary, owning a cleaning company, and
4 working for a roofing company. AR 35-36. She did not work at all from June 2004, to April 2012.
5 AR 36. She stopped working after a car wreck on May 27, 2004. *Id.* She injured both shoulders,
6 her neck, and low back in the accident. *Id.* She had surgery in 2004. *Id.* She received treatment
7 for her neck from the time of the car accident. AR 36-37. The surgery on her back was a level 2
8 cervical fusion at C5/C6, and C6/C7 in October 2006. AR 37. She had several rounds of injections
9 following her neck surgery. Her fusion was deemed successful, 90% “until I fell.” *Id.* She fell at
10 Sunrise Hospital on October 2, 2009. AR 37-38. She reinjured her right shoulder, tore the
11 meniscus in her left knee, reinjured her neck, and had more rounds of epidural injections. AR 38.

12 She had a lumbar spine fusion done in November 2009. *Id.* MRIs performed in 2008 and
13 2009 showed herniated disks at L4/L5 and annular tears, as well as bulges at L4/L5, and
14 compression on the nerve roots. *Id.* She could not walk, her legs were always burning, she felt
15 like she was in the first stages of child birth, and took a lot of pain meds. *Id.* She related all of
16 these symptoms to the accident of June 2004. AR 39.

17 She had right shoulder surgery in 2006, and a follow up surgery in October or November
18 2007. *Id.* The first surgery was orthoscopic, just trying to clean out the area; however, it didn’t
19 work. *Id.* The second surgery was a capsulary repair where the tendons were pulled through her
20 bones. *Id.*

21 With respect to her shoulder injuries, she did not get treatment for the left shoulder from
22 the car accident. *Id.* However, after the fall at Sunrise, a new tear was located. AR 39-40. She
23 has received treatment from 2012, until the present consisting of epidural injections, physical
24 therapy, massage, and in the beginning, chiropractic in addition to “a lot of stuff and pain
25 management.” AR 40. She took six Oxycodone 15s a day, two Motrin 800s a day, and a Valium
26 10 mg in the morning. *Id.* She took those medications from 2012, until she “detoxed on my own.”
27 *Id.* From 2007 until she detoxed, she took 6 Oxycodones a day, and prior to that was taking Norco
28 10 mg, 8 a day. *Id.* The medications were prescribed by a doctor and monitored. *Id.*

1 The summer before the hearing, she tried to stop taking medications, but testified “it’s not
2 working.” AR 41. Her 19-year-old son and 17-year-old daughter do dinner, fold the laundry,
3 clean the house, and she sits. She gets migraines that make her feel like she wants to throw up
4 stemming from her neck and arms from sitting. *Id.*

5 When asked how she spent her days from 2007 until 2012, she responded “in sweats, eating
6 pain pills, trying to function.” AR 41. She did little or nothing. AR 42. From 2007, to April
7 2012, she was able to sit comfortably for five to eight minutes before radiating pain to her shoulder
8 blades and the back of her head would go down to her right leg. AR 42. She was unable to stand
9 comfortably for more than five to eight minutes. *Id.* She was not able to walk. *Id.* The only
10 position she was really comfortable in was a recliner, and she still slept sitting up because she
11 could not lay flat. AR 43. She had difficulty falling asleep because she could not get comfortable.
12 *Id.* She never had much luck with epidural injections beginning early on through 2011. *Id.*

13 She had surgery in November 2007, and testified she was in a sling for a while and then
14 did physical therapy. AR 43-44. She moved to Arizona and found a physical therapist and did
15 physical therapy for approximately four months. AR 44. The 2009 lumbar surgery was a
16 “nightmare.” *Id.* It took a total of nine months to recover from that surgery. *Id.* At the time of
17 the administrative hearing, she had a right shoulder tear from a fall at Sunrise Hospital in 2009.
18 AR 45. This fall occurred approximately a month before her lumbar surgery. *Id.* Until these new
19 developments with her shoulder [the Sunrise Hospital fall in 2009] her shoulders “were taken care
20 of in 2007.” AR 46. Since the fall in 2009, her right shoulder is now worse. *Id.*

21 Vocational expert Jack Dymond² testified that Glasco’s past relevant work was as a
22 secretary, classified as sedentary work, SVP 6 under the DOT. AR 47. She was also an
23 owner/manager of custodial services classified as light, SVP 8 under the DOT. *Id.* Glasco was
24 asked what she was doing in 2001 to 2012 for work and testified she was working as a secretary
25 at a roofing company. AR 47-48. The ALJ inquired whether there were any opinions in the record
26 about residual functional capacity. AR 48. Counsel for Glasco responded “nothing specific
27 pertaining to an RFC,” and stated “if we’re getting one from a treating physician, that would also

28 ² Mr. Dymond’s name was misspelled in the transcript of the hearing as “Diamond.”

1 be pretty much irrelevant since we're going back in time." *Id.* The attorney was asked what his
 2 argument was for less than sedentary work for the period of closed disability, counsel responded
 3 "that the recuperation period would have literally limited her to being in bed for the majority of
 4 the day and prevented her from at least—aside from the fact that she'd probably be limited to less
 5 than sedentary due to the fact that it took her so long to recuperate and the obvious proof that she
 6 had the continuing effects is the continuous treatment from the treating physicians, as well as the
 7 epidural injections all the way through 2011 to the present time." AR 49-50. Additionally,
 8 Counsel stated that even if Glasco was capable of working again, "it'd more of a vocational expert
 9 issue, but I do not believe because of her physical symptoms she would have been out of work for
 10 more than two days per month caring for her physical problems." AR 50.

11 **B. Treatment Records**

12 The Administrative Record contains treatment records consisting of:

- 13 • Hospital Records/Operative Report dated October 6, 2006, from Jaswinder Grover
 14 M.D./St. Rose Dominican Hospital-Sienna. AR 147-148.
- 15 • An August 27, 2007 MRI of the lumbar spine from Govind Koka, M.D. AR 149
- 16 • A CT exam of the lumbar spine post discogram, dated September 6, 2008, from
 17 Hans J. Rosler, M.D. AR 150.
- 18 • An x-ray of the chest dated January 4, 2009, from Govind Koka, M.D. AR 151.
- 19 • Miscellaneous lab reports dated July 22, 2009, from Desert Institute of Spine Care.
 20 AR 152-153.
- 21 • An MRI arthrogram of the right shoulder dated February 9, 2010, from Michael
 22 Crovetti, Jr., DO. AR 154-55.
- 23 • A progress report/discharge summary dated February 10, 2010, from Spine &
 24 Sports Rehabilitation. AR 156.
- 25 • Miscellaneous labs dated November 6, 2009, to June 2, 2010, from Primary Care
 26 Consultants. AR 157-160.
- 27 • An initial consultation note dated July 19, 2010, from Michael Prater,
 28 M.D./Advanced Pain Consultants. AR 161-163.

- 1 • Office Treatment Records/Operative Report dated January 31, 2006, to September
- 2 15, 2010, from Jorg Rossler, M.D./Nevada Spine Clinic. AR 164-179.
- 3 • Consultation dated September 29, 2010, to February 17, 2011, from Joseph
- 4 Schifini, M.D./Institute of Orthopaedic Surgery. AR 180-188.
- 5 • Office Treatment Records dated July 16, 2009, April 21, 2011, from Andrew Cash,
- 6 M.D. AR 189-258.
- 7 • A Neurology Evaluation/EMG/NCV Study dated August 8, 2006, to May 16, 2011,
- 8 from Russell Shah, M.D. AR 259-279.
- 9 • A Surgical Report dated January 16, 2011, from Seven Hills Surgery Center/Dr.
- 10 Crovetti. AR 286-87.
- 11 • A Medical Evaluation dated June 13, 2016, from The Center for Diseases and
- 12 Surgery of the Spine. AR 288-291.
- 13 • A Surgical Report dated October 15, 2007, from Seven Hills Surgery Center-Dr.
- 14 Crovetti. AR 292-293.
- 15 • An Operative Report dated August 14, 2007, to September 6, 2008, from the Center
- 16 for Spine & Special Surgery. AR 294-300.
- 17 • An Operative Report dated November 20, 2009, from Dr. Andrew Cash. AR 301-
- 18 309.
- 19 • A Surgical Report dated November 20, 2009, to November 24, 2009, from St. Rose
- 20 Dominican Hospital. AR 310-320.
- 21 • Consultation and Surgical Reports dated September 26, 2005, to February 8, 2011,
- 22 from Institute of Orthopaedic Surgery-Dr. Joseph Schifini. AR 321-342.

23 After the administrative hearing, counsel submitted a representative letter attaching a

24 Medical Assessment Physical Ability-Work Related Activities report dated October 4, 2010, from

25 Govind Koka, DO. AR 343-346. The cover letter from Attorney Charles Weiser stated that at the

26 hearing, the ALJ noted that the record was devoid of functional assessment by a physician who

27 had been a treating claimant since Glasco's first motor vehicle accident in 2005. AR 343 Therefore,

28 after the hearing, counsel contact Dr. Govind Koka, who had been attending the claimant since

1 2005. The doctor completed and returned the medical assessment questionnaire that was attached
2 to the letter. AR 344-46.

3 **V. ANALYSIS AND FINDINGS**

4 Glasco's motion to remand asserts the ALJ committed reversible error by failing to
5 consider the opinions of treating physician Dr. Govind Koka, specifically, the medical assessment
6 form. However, Dr. Koka did not provide this medical assessment until after the administrative
7 hearing at the request of counsel. The post-hearing medical assessment is a check-the-box form
8 with some handwritten notations supporting the findings. Dr. Koka's post hearing assessment
9 opined that Glasco could occasionally lift and/or carry 10 pounds "for a total, of from very little
10 up to one-third of an 8-hour work day." AR 344. A handwritten notation indicated that this finding
11 was supported by an MRI report and decreased range of motion, cervical and lumbar fusions, and
12 a right shoulder fracture. *Id.* She could frequently lift or carry for a total of from one-third to two-
13 thirds of an 8-hour work day, a maximum of less than 10 pounds. *Id.* These findings were
14 supported by an MRI report, decreased range of motion, cervical and lumbar fusions and right
15 shoulder fracture. *Id.* He opined Glasco could stand or walk less than 2 hours in an 8-hour work
16 day, sit with normal breaks for less than 6 hours in an 8-hour work day with periodically alternating
17 sitting and standing to relieve pain and discomfort. AR 345. Boxes were checked indicating her
18 abilities to sit and/or pull were limited in upper and lower extremities. *Id.* However, the nature
19 and degree of the limitations were not described. *Id.* The last page of the form contains a notation
20 "patient has undergone continuous treatment from 2005-present." AR 346. The restrictions on
21 the form were noted to have been present from "2005 to present (2012)". *Id.* The report is dated
22 October 4, 2012. However, none of Dr. Koka's treatment records indicate Glasco was unable to
23 engage in substantial gainful activity for a continuous twelve-month period during the closed
24 period of disability alleged.

25 The ALJ's opinion did not mention Dr. Koka, or any other of Glasco's treating physicians
26 by name. However, his opinion systematically reviewed and discussed Glasco's treatment history
27 and medical records that were part of the administrative record. His decision that Glasco was not
28 disabled due to her severe and non-severe medically determinable impairments was based

1 primarily on his finding that none of Glasco's impairments met the durational requirements for
2 disability under the Social Security Act. That is, the ALJ found that the objective medical evidence
3 showed that her recovery time from her various surgeries was a maximum of 9 months, rather than
4 the 12 continuous months required by the Act for a finding of disability. The ALJ noted that other
5 than her surgeries, Glasco had received minimal treatment and had no frequent consistent
6 treatment history. AR 19. This contradicted her representative's theory of the case. *Id.* The ALJ
7 found that the medical records from her treating physicians indicated that her recovery time from
8 her lumbar fusion surgery was only 9 months. *Id.* An EMG study showed that her cervical
9 radiculopathy lasted only 4 to 9 months. *Id.* This fell short of the durational requirement, which
10 requires an individual to be unable to engage in substantial gainful activity for 12 continuous
11 months due to a disability before eligible for disability benefits. AR 19-20.

12 The ALJ correctly noted that there were very few treatment records after 2009 which,
13 coupled with the objective medical evidence in the AR, suggested that her symptoms were under
14 control. AR 20. She had been treated with epidural steroid injections, but there was no evidence
15 that she had received a steroid injection since February 2011, and only a few records showing
16 injections between the end of 2009 and February 2011. *Id.*

17 The ALJ noted that although Glasco had a history of degenerative disc disease of the
18 lumbar spine, on August 27, 2007, an MRI showed only mild degenerative changes. *Id.* A CT
19 scan of the lumbar spine on September 6, 2008 after a discogram, showed normal nucleogram at
20 L1 through L3 and L3 through L4, a right posterolateral annular tear and disc bulges at L4 through
21 L5, a central disc herniation and partial thickness annular tear at L5 through S1, that produced a
22 slight impression on the S1 nerve root in the lateral recess. *Id.*

23 The decision also pointed out that Glasco underwent another MRI of the lumbar spine on
24 July 29, 2008. *Id.* The impression was mild desiccation and annular bulging at L4 through L5
25 with no significant spinal canal or foraminal stenosis seen. *Id.* A July 23, 2009 X Ray of the
26 lumbar spine was within normal limits. AR 21. After her 2009 lumbar surgery a July 1, 2010 MRI
27 of the cervical spine showed evidence of the prior cervical fusion but was otherwise normal. *Id.*
28 On September 29, 2010 she was referred by her treating physician to a consultant for neck pain,

1 but exhibited no obvious pain behavior. AR 22. On examination she had a full range of motion of
2 the bilateral upper extremities, and normal muscle strength/tone and grip strength of her
3 biceps/triceps and deltoid. *Id.* Deep tendon reflexes were normal as well as sensation,
4 coordination, and joint stability. *Id.*

5 The ALJ's decision systematically went through the entire medical record and the court
6 finds he accurately reported the findings made by the various treating physicians, as well as the
7 diagnostic tests and studies that were conducted. Although he did not mention the names of the
8 various treating physicians, providers and diagnosticians, his opinion accurately reflected their
9 findings. It is important to point out that Glasco testified at the administrative hearing that she
10 recovered from her 2009 lumbar spine surgery in nine months. AR 44. The ALJ also correctly
11 pointed out that Glasco was a no call/no show for a follow up appointment following bilateral C6-
12 7 epidural steroid injections on February 17, 2011 (AR 180), and cancelled an appointment for a
13 January 25, 2011 cervical injection the morning of the procedure. AR 182. He found this showed
14 her pain was not as severe as she claimed, or she would have kept her appointments to get the
15 benefits of potential pain relief. AR 23.

16 The court has thoroughly reviewed the AR and finds that the treatment records of her own
17 treating physicians, which the ALJ comprehensively reviewed and discussed, support the ALJ's
18 determination Glasco did not establish she was disabled and unable to engage in substantial gainful
19 activity for a continuous twelve-month period between December 1, 2007 and April 1, 2012. To
20 the contrary, the records of the treating physician who saw her after her lumbar surgery indicate
21 she was capable of returning to work as early as February 11, 2010. For example, Dr. Cash was
22 one of the 2 surgeons who performed the lumbar discectomy and fusion on November 20, 2009
23 following Glasco's fall at Sunrise Hospital on October 4, 2009. He saw Glasco in post-operative
24 follow up appointments. A February 11, 2010 record of a post-op visit stated "patient may return
25 to light duty." AR 219. In a subsequent visit on May 13, 2010 Dr. Cash stated "patient may return
26 to full duty." AR 219.

27 CONCLUSION

28 Having carefully reviewed the record as a whole, the court finds the ALJ's decision is


1 supported by substantial evidence, and that the ALJ did not commit reversible error in finding
2 Glasco did not meet her burden of establishing she was disabled under the Social Security Act. The
3 ALJ correctly found that the medical treatment records did not support a finding that Glasco was
4 unable to engage in substantial gainful activity due to a disability for 12 continuous months for the
5 closed period of disability alleged. Although Dr. Koka's post hearing check-the-box form
6 suggested she had work-related restrictions, nothing in the treatment records in the Administrative
7 Record support a finding that Glasco was unable to perform her past relevant work as a secretary,
8 which is classified under the DOT as a SVP 6, sedentary.

9 For these reasons,

10 **IT IS RECOMMENDED:**

- 11 1. Glasco's Motion to Reverse/Remand (ECF No. 14) be **DENIED**.
- 12 2. The Commissioner's Cross-Motion to Affirm (ECF No. 16) be **GRANTED**.

13 Dated this 19th day of October, 2016.

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16 PEGGY A. LEEN
17 UNITED STATES MAGISTRATE JUDGE
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